No. (1)

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1993

DAWUD MAJID MU'MIN,

Petitioner,

v.

EDWARD W. MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether Dawud Mu'Min was denied effective assistance of counsel during the guilt and sentencing phases of the trial and on direct appeal to the Virginia Supreme Court, in violation of his rights under the Sixth Amendment to the United States Constitution.

TABLE OF CONTENTS

QUESTION PRESENTED 1

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 3

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

ARGUMENT 15

I. MU'MIN WAS DENIED REASONABLY EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND ON DIRECT APPEAL. 15

A. The Failure of Mu'Min's Counsel to Appeal the Trial Court's Refusal to Grant a Change of Venue Amounted to Ineffective Assistance of Counsel. 18

B. The Failure of Mu'Min's Counsel to Request that A Limiting Instruction Be Given to The Jury Regarding His Past Murder Conviction Amounted to Ineffective Assistance of Counsel. 21

C. The Failure of Mu'Min's Counsel to Object to the Penalty Instructions at Trial and on Appeal Amounted to Ineffective Assistance of Counsel. 23

D. The Failure of Mu'Min's Counsel to Object to the Definition of Reasonable Doubt Employed by the Trial Court Resulted in Ineffective Assistance of Counsel. 29

E. The Failure of Mu'Min's Counsel to Object to Certain Issues Regarding the Vileness Aggravating Circumstance in the Virginia Death Penalty Statute Constituted Ineffective Assistance of Counsel. 32

F. The Failure of Mu'Min's Counsel to Object to the Jury Verdict Form Amounted to Ineffective Assistance of Counsel. 33

G. The Failure of Mu'Min's Counsel to Object To and Appeal The Trial Court's Failure to Define "Life Sentence" for The Jury Amounted to Ineffective Assistance of Counsel. 35

H. The Failure of Mu'Min's Counsel to Raise on Appeal Certain Issues Regarding Future Dangerousness Resulted in Ineffective Assistance of Counsel. 38

CONCLUSION 43

TABLE OF AUTHORITIES

Anders v. California, 386 U.S. 738 (1967) 16

Argersinger v. Hamlin, 407 U.S. 24 (1972) 15

Briley v. Commonwealth, 273 S.E.2d 57 (1980) 20

Buchanan v. Commonwealth, 384 S.E.2d 757 (1984) 20, 27

Cage v. Louisiana, 498 U.S. 39 (1990) 30, 31

Caldwell v. Mississippi, 472 U.S. 320 (1985) 39

California v. Ramos, 463 U.S. 992 (1983) 36

Cunningham v. Zant, 928 F.2d 1006 (10th Cir. 1991) 26

Eaton v. Commonwealth, 397 S.E.2d 385 (1990) 23

Edmonds v. Commonwealth, 329 S.E.2d 807 (1985), cert. denied, 474 U.S. 975 (1985) 42

Furman v. Georgia, 408 U.S. 238 (1972) 24, 40

Gideon v. Wainwright, 372 U.S. 335 (1963) 15

Gregg v. Georgia, 428 U.S. 153 (1976) 24

Jackson v. Virginia, 443 U.S. 307 (1979) 30

Lockett v. Ohio, 438 U.S. 586 (1978) 33, 36

Maynard v. Cartwright, 486 U.S. 356 (1988) 40

Mu'Min v. Commonwealth, 239 Va. 433, 389 S.E.2d 886 (1990) 1, 11

Mu'Min v. Virginia, 111 S. Ct. 1899 (1990) 1, 11, 12

Mu'Min v. Virginia, 112 S. Ct. 13 (1991) 12

Newcomer v. Commonwealth, 255 S.E.2d 485 (Va. 1979) 19

O'Dell v. Commonwealth, 364 S.E.2d 491 cert. denied, 488 U.S. 871 (1988) 26

Parker v. Dugger, 498 U.S. 308 (1991) 28

Penry v. Lynaugh, 492 U.S. 302 (1989) 34

Sheppard v. Maxwell, 384 U.S. 333 (1976) 19

Stockton v. Commonwealth, 314 S.E.2d 371 (1984), cert. denied, 469 U.S. 873 (1988) 19

Strickland v. Washington, 466 U.S. 668 (1984) 13, 14, 16, 21

Stringer v. Black, 112 S. Ct. 1130 (1992) 40

Sullivan v. Louisiana, 113 S. Ct. 2078 (1993) 31

United States v. Ash, 413 U.S. 300 (1973) 16

United States v. Cronic, 466 U.S. 648 (1984) 15

In re Winship, 397 U.S. 358 (1970) . . 30

STATUTES

28 U.S.C. § 1257(a) 3

U.S. Const. amend. VI 3

U.S. Const. amend. XIV, § 1 4

Va. Code Ann. §18.2-31 (Michie 1988) . 6

Va. Code Ann. §19.2-251 (Michie 1990) 19,28,34,41

OPINIONS BELOW

The March 2, 1990 decision of the Virginia Supreme Court affirming the conviction and sentencing of Dawud Majid Mu'Min ("Mu'Min") is reported as Mu'Min v. Commonwealth, 239 Va. 433, 389 S.E.2d 886 (1990).

This Court affirmed the decision of the Virginia Supreme Court regarding the sufficiency of jury voir dire at the trial, as reported in Mu'Min v. Virginia, 111 S. Ct. 1899 (1990), and denied a petition for rehearing in Mu'Min v. Virginia, 112 S.Ct. 13 (1991).

The March 10, 1993 Order of the Circuit Court of Prince William County dismissing Mu'Min's Petition for a Writ of Habeas Corpus is not reported, and is reprinted in the Appendix at pages 5-10. The October 4, 1993 Order of the Virginia Supreme Court affirming the decision of

the Circuit Court is not yet reported, and is reprinted in the Appendix at pages 1-4.

JURISDICTION

The decision of the Virginia Supreme Court was issued on October 4, 1993. The court ruled in error on the issue of whether Mu'Min was afforded effective assistance of counsel sufficient to satisfy the requirements of the Sixth Amendment to the United States Constitution. Thus, this Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him;

> to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

In 1973, Mu'Min was convicted of first-degree murder in Grayson County, Virginia, and was sentenced to a term of 48 years for that offense. In the spring of 1988, he was assigned to Haymarket Unit 26, a minimum security institution in

Prince William County, Virginia, and was working outside of the institution on a Department of Transportation work crew on September 22, 1988. The evidence at trial showed that when the work crew suspended operations for lunch, Mu'Min crossed the perimeter fence and walked along Interstate Route 95 a distance of approximately one mile to Ashdale Plaza, a shopping center located in Dale City, Virginia. There, he entered Dale City Floors, a retail carpet store, and asked the operator, Gladys Nopwasky, about oriental carpets.

A heated argument and physical altercation ensued, after which Ms. Nopwasky died. The autopsy revealed that she died as a result of multiple stab wounds.

Mu'Min was indicted on October 3, 1988 for the murder of Gladys Nopwasky "while a prisoner confined in a state or

local correctional facility or while in the custody thereof, or while in the commission of a robbery, while armed with a deadly weapon, or during the commission of or subsequent to rape," in violation of Va. Code Ann. § 18.2-31 (Michie 1988). Mu'Min pleaded not guilty and his trial was scheduled in the Circuit Court of Prince William County, Virginia. The court appointed Ronald Fahy and Lawrie Rollison to serve as counsel for Mu'Min.

The case generated an unusual amount of pretrial publicity. The death of Ms. Nopwasky on the afternoon of September 22, 1988, was a sensational event reported not only in Prince William County, but throughout Virginia. Between Mu'Min's arrest on October 3, 1988 and his trial in April 1989, more than 47 articles about the crime and the suspect appeared in the Washington Post, Potomac News, Prince William Journal and Weekly

Messenger. Ms. Nopwasky's stabbing was also extensively reported and analyzed in the electronic media. Not surprisingly, the public was exposed to information that should not properly have been brought to the attention of a jury.[1] Nevertheless, despite a pretrial motion for change of venue, Mu'Min's trial was conducted in Manassas, Virginia before a jury not only familiar with the case, but perhaps also predisposed to finding Mu'Min both guilty

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[1] The media coverage emphasized the following: Mu'Min's prior conviction for first degree murder and his status as a prisoner at the time of the crime; his failure to qualify for parol six times, his 23 alleged prison infractions committed during his incarceration; his juvenile record in New York and Virginia; and the fact that he walked away from a Virginia Department of Transportation work detail while a prisoner serving a sentence for first degree murder. In addition, the media published "descriptions" of the crime which included the incorrect information that Mu'Min had raped Ms. Nopwasky and had confessed to the killing. The publicity was so extensive that it precipitated a public controversy about the policies of the Virginia Department of Corrections.

and deserving of the death penalty. The trial judge denied the motion for change of venue, stating that it was his "considered opinion that we can get a fair and impartial jury." Counsel for Mu'Min never appealed the trial court's denial of this motion.

Mu'Min's trial commenced on April 17, 1989. Despite a pretrial motion to prevent the Commonwealth from introducing evidence of prior crimes, the trial court allowed the Commonwealth to make repeated references to Mu'Min's conviction for murder in 1973. The court also, over defense counsel's objection, admitted into evidence a copy of the judgment Order which established that Mu'min had been previously convicted of first degree murder on the basis that the Commonwealth was required to prove, as part of its case, that Mu'min was a prisoner "confined

in a state or local correctional facility."

Based on the evidence presented, the judge submitted to the jury instructions on several lesser included offenses, including first degree murder, second degree murder, and voluntary manslaughter. During the argument on jury instructions for the guilt phase of the proceedings, Mu'Min's attorneys never requested an instruction limiting the jury's consideration of evidence of his 1973 murder conviction.

As to the "reasonable doubt" standard, the trial court instructed the jury that the Commonwealth must prove:

> ... each and every element of the offense beyond a reasonable doubt.
>
> This does not require proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence.

Counsel for Mu'Min failed to object to this jury instruction.

On April 20, 1989, the jury found Mu'Min guilty of capital murder. During the sentencing phase of the proceedings, the jury was provided with additional instructions by the trial court. Mu'Min's lawyers failed to object to certain instructions regarding the consideration of mitigating evidence and "vileness" as an aggravating circumstance. Counsel for Mu'Min also failed to object to the jury verdict form used by the trial court in the sentencing proceedings.

At the close of the sentencing hearing, the jury deliberated for several hours and at one point returned with a question about the meaning of a life sentence. The trial judge refused to answer the question. Mu'Min's attorneys again failed to object. Shortly thereafter, on April 24, 1989, the jury

recommended a sentence of death. After taking the matter under advisement and reviewing the pre-sentence report, the trial judge accepted the jury's recommendation and, on June 12, 1989, sentenced Mu'Min to death.

On direct appeal, counsel for Mu'Min never raised the issue of the trial judge's refusal to answer the question from the jury. The Virginia Supreme Court affirmed the conviction and sentence. Mu'Min v. Commonwealth, 239 Va. 433, 389 S.E.2d 886 (1990).[2]

On October 9, 1990, this Court granted Mu'Min's Petition for a Writ of Certiorari solely on the issue of the constitutional infirmity of the jury voir dire allowed by the trial court. Mu'Min v. Virginia, 111 S. Ct. 1899 (1990). On

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[2] On April 20, 1990, the Virginia Supreme Court denied Mu'Min's Petition for Rehearing.

May 30, 1991, the Court, by a 5-4 vote, affirmed the decision of the Virginia Supreme Court on that one issue. Id.[3]

Mu'Min filed a habeas corpus petition on August 7, 1992, and an amended petition ("Petition") on December 11, 1992 in the Circuit Court of Prince William County. In his amended petition, Mu'Min asserted fourteen separate claims as grounds for habeas corpus relief. In Claim XIV, Mu'Min argued that he was denied effective assistance of counsel throughout the trial court proceedings (both the conviction and sentencing stages), and through his appeal to the Virginia Supreme Court. See Amended Petition, Appendix, pp. 11-12. Mu'Min asserted that "said ineffective assistance of counsel was in violation of rights guaranteed by the Fifth, Sixth,

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[3] On August 2, 1991, this Court denied Mu'Min's Petition for Rehearing. Mu'Min v. Virginia, 112 S. Ct. 13 (1991).

Eighth and Fourteenth Amendments to the United States Constitution ...". Amended Petition, Appendix, p. 11.

During oral arguments before the circuit court, new counsel for Mu'Min raised the issue of ineffective assistance of counsel. See Appendix, pp. 14-28.

By order entered on March 10, 1993, the Circuit Court dismissed the Petition without an evidentiary hearing. As to Mu'Min's claim alleging ineffective assistance of counsel, the Circuit Court stated, "the petitioner's claim of ineffective assistance of counsel, is without merit, Strickland v. Washington, 466 U.S. 668 (1984) ...". Appendix, p. 8.

Mu'Min timely filed a Petition for Appeal to the Virginia Supreme Court. As Assignment of Error Number Nine, Mu'Min argued that the Circuit Court erred in dismissing his claim that he had been denied effective assistance of counsel, in

violation of his Sixth Amendment rights. See Petition for Appeal, Appendix, pp. 35-37.

By Order dated October 4, 1993, the Virginia Supreme Court denied Mu'Min an appeal. In regard to the ineffective assistance of counsel claim, the court simply stated, "[t]he Court finds no merit in assignment of error No. 9. Strickland v. Washington, 466 U.S. 668 (1984)." Appendix, p. 3.

The issue of whether Mu'Min was ever afforded effective assistance of counsel, sufficient to satisfy the requirements of the Sixth and Fourteenth Amendments to the United States Constitution, was properly raised in the state court habeas corpus proceeding. The state courts dismissed Mu'Min's claim without any evidentiary hearing. Thus, this matter is properly within the jurisdiction of this Court.

ARGUMENT

I. MU'MIN WAS DENIED REASONABLY EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND ON DIRECT APPEAL.

Mu'Min was denied the effective assistance of counsel during the guilt and sentencing phases of trial, at the sentencing hearing, and on appeal to the Virginia Supreme Court. The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to be represented by counsel, a right which has been recognized as the most basic component of our criminal justice system. This Court has repeatedly emphasized the "fundamental" role of effective representation by counsel in order to receive a fair trial.[4] This Court has also recognized that

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[4] See, e.g., United States v. Cronic, 466 U.S. 648 (1984); Argersinger v. Hamlin, 407 U.S. 24, 31 (1972); Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963).

counsel is the means through which other rights of the person on trial are secured,[5] and that our system of criminal justice presumes that counsel will act as an accused's forceful and undivided advocate. Anders v. California, 386 U.S. 738 (1967). Clearly, the right to counsel contemplates the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984).

In Strickland, this Court stated that counsel is constitutionally ineffective if counsel's conduct so undermines the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Id. at 685. The test established by the Court is twofold: was counsel's performance in fact deficient? and, if so, was the

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[5] Cronic, 466 U.S. at 653; see also United States v. Ash, 413 U.S. 300, 307 (1973) (counsel serves as a "guide through complex legal technicalities").

deficient performance prejudicial to the defendant? Id. at 668.

In order to make the first determination, the proper inquiry is whether counsel's conduct falls below an objective standard of reasonableness. Therefore, a defendant challenging the effectiveness of trial counsel must show that the particular acts of counsel were outside the "wide range of professionally competent assistance." Id. at 694. In order to satisfy the prejudice requirement, a petitioner must demonstrate that there is a reasonable probability that but for counsel's actions the result of the proceeding would have been different. Id. All of the specific failures by trial counsel set forth herein establish that Mu'Min did not receive adequate assistance from counsel.

The decision of the Supreme Court of Virginia, holding that Mu'Min's claim

regarding ineffective assistance of counsel lacks merit, directly contradicts constitutional principles as defined by the decisions of this Court.

A. The Failure of Mu'Min's Counsel to Appeal the Trial Court's Refusal to Grant a Change of Venue Amounted to Ineffective Assistance of Counsel.

On January 23, 1989, in response to a pre-trial motion by defense counsel, the trial court deferred Petitioner's Motion for a change of venue. When renewed by defense counsel at trial, the court denied the motion. Denial of the motion was improper because the residents of Prince William County, from which the jurors were selected, had been tainted by extensive pretrial publicity and could no longer be impartial.

The Sixth Amendment to the United States Constitution guarantees the accused in a criminal case the right to a "fair trial" and an "impartial jury."

Similarly, the purpose of Virginia's change of venue statute, Va. Code Ann. § 19.2-251 (Michie 1990), is to ensure that all parties receive a fair and impartial trial. Newcomer v. Commonwealth, 255 S.E.2d 485, 488 (Va. 1979). In Newcomer, the Virginia Supreme Court recognized that Va. Code § 19.2-251 is to be liberally construed to attain the ends of justice. Id. at 487. Although the presumption is that a defendant can receive a fair trial in the jurisdiction in which the offense occurred,[6] where there is a "reasonable likelihood" of empaneling a prejudicial jury, the defendant has a constitutional right to a change of venue. Sheppard v. Maxwell, 384 U.S. 333, 363 (1976). Courts should grant a change of venue if there is widespread

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[6] See Stockton v. Commonwealth, 314 S.E.2d 371, 379 (1984), cert. denied, 469 U.S. 873 (1988).

prejudice reasonably likely to prevent a fair trial, as in Mu'Min's case.

The Virginia Supreme Court has stated that in determining whether a defendant has been prejudiced by pretrial media coverage, the court must consider not only the volume of coverage, but also its content, tenor and tone. Briley v. Commonwealth, 273 S.E.2d 57, 61 (1980). In a case in which widespread publicity is inaccurate, intemperate and inflammatory, like Mu'Min's case, a motion for change of venue should be granted. See Buchanan v. Commonwealth, 384 S.E.2d 757, 768 (1984).

The trial court's denial of Mu'Min's motion for a change of venue clearly deprived Mu'Min of his constitutional right to an impartial jury, and warranted reversal of his conviction. Mu'Min's trial counsel did not assign the trial court's refusal to grant a change of venue as an error on appeal. Counsel's failure

to appeal the issue amounted to ineffective assistance of counsel since Mu'Min was denied his right to a fair, prejudice-free trial. But for this failure, the Virginia Supreme Court may have reversed the conviction on appeal.

B. The Failure of Mu'Min's Counsel to Request that A Limiting Instruction Be Given to The Jury Regarding His Past Murder Conviction Amounted to Ineffective Assistance of Counsel.

Mu'Min was denied the effective assistance of counsel when his counsel failed to request an instruction limiting the jury's consideration of evidence of his past murder conviction. This failure clearly "f[a]lls below an objective standard of reasonableness even in light of the 'highly deferential' nature of the review afforded in such instances." Strickland, 466 U.S. at 684, 689 (1984).

The relevant instruction given by the trial court during the guilt phase of the trial was:

> You may consider proof of the defendant's prior conviction of a felony as affecting his credibility, but it does not render him incompetent to testify, nor should you consider it as evidence of his guilt of the offense for which he is on trial.

Clearly, this instruction was inadequate to protect Mu'min's right to a fair trial and prejudice-free jury. Although the jury was instructed that prior crimes could not be used as evidence of guilt in this proceeding, it was not instructed that prior convictions must not be considered as evidence of an individual's propensity to commit similar crimes.

The evidence of Mu'Min's prior conviction should not have been admitted at all; however, after it was, Mu'Min's counsel should have requested that the

jury be instructed on its proper use determining Mu'Min's guilt or innocence.[7] There is no way that a jury's determination of guilt or innocence would not be affected by the knowledge that the accused had been previously convicted of murder. If Mu'Min's trial counsel had requested and been granted an instruction limiting evidence of the nature of the prior conviction, there is a reasonable possibility that the jury might have had a reasonable doubt about Mu'Min's guilt. The Virginia Supreme Court plainly erred in holding that this failure by counsel for Mu'Min did not violate Mu'Min's rights under the Sixth Amendment.

C. The Failure of Mu'Min's Counsel to Object to the Penalty Instructions at Trial and on

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[7] Such limiting instructions are well recognized in the law. E.g., Eaton v. Commonwealth, 397 S.E.2d 385 (1990).

Appeal Amounted to Ineffective Assistance of Counsel.

The trial court's sentencing phase instructions failed to provide the jury with a vehicle to facilitate the consideration of mitigating evidence. The trial court neither defined "mitigating evidence" nor provided the jury any guidance on what to do with any evidence the jury might have concluded was mitigating on its own. Mu'Min's lawyers failed to object to the jury instructions concerning mitigating evidence, and thus denied him his right to effective assistance of counsel under the Sixth Amendment.

The critical role of mitigating evidence is a cornerstone of modern capital punishment jurisprudence. Gregg v. Georgia, 428 U.S. 153 (1976). In Gregg, this Court stated:

> In summary, the concerns expressed in Furman that

> the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.

Id. at 195 (emphasis added). This Court has recognized the vital importance of guiding the jury's discretion in choosing between life and death. Gregg, supra; Lockett v. Ohio, 438 U.S. 586 (1978). Proper guidance is essential to avoid the freakish and arbitrary imposition of the death penalty. Because mitigation is an indispensable element of guided discretion, the failure to either define mitigation or to instruct the jury as to its purpose in the sentencing process renders any resulting death sentence fatally defective under the Eighth and Fourteenth Amendments.

Applying these principles, the Eleventh Circuit Court of Appeals has

specifically held that the failure to explain to the jury the meaning of "mitigating" facts renders a death sentence unconstitutional, even where mitigation was properly defined in the written instructions. Cunningham v. Zant, 928 F.2d 1006, 1011 (10th Cir. 1991). That Court reasoned that where mitigating evidence is presented, "the absence of any explanatory instructions on mitigation creates a reasonable possibility that the jury misunderstood the meaning and the function of the mitigating evidence in the sentencing deliberations." Id. at 1012.

Despite this unwavering constitutional directive, the Virginia Supreme Court has repeatedly held that capital defendants are not entitled to any jury instruction defining mitigation. See, e.g., O'Dell v. Commonwealth, 364 S.E.2d 491, 507, cert. denied, 488 U.S. 871 (1988). The court's rationalization

for this rule -- that defendants benefit from this lack of definition because any definition would necessarily limit the scope of the mitigation -- is highly prejudicial to the accused.[8] In fact, the lack of definition renders the jury unable to rationally discern those cases which are truly deserving of the death penalty and those which are not.

In Mu'Min's case, the lack of instructions was particularly egregious. The jury was given specific aggravating circumstances on the one hand, and no language about mitigating circumstances on the other. Thus it is possible that a reasonable juror could have failed to understand that it could

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[8] This rule has even been extended to statutory mitigating factors, such as the age of the defendant. Buchanan v. Commonwealth, 384 S.E.2d 757, 773 (1989), cert. denied, 493 U.S. 1063 (1990).

consider, for example, some aspect of Mu'Min's character and background in mitigation of punishment.

This not only violated Mu'Min's rights guaranteed by Va. Code § 19.1-299, but also his right to a reliable determination of the appropriate sentence, as guaranteed by the United States Constitution.[9]

The sentencing phase instructions at Mu'Min's trial failed to explain mitigating evidence to the jury. Similarly, the jury was not provided any guidance as to how to apply any evidence it might consider "mitigating." Trial counsel's failure to object to these

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[9] In Parker v. Dugger, 498 U.S. 308 (1991), the Court reaffirmed that "if a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." 498 U.S. at 321 (quoting Spaziano v. Florida, 468 U.S. 447 (1984).

deficient instructions at trial and to assign them as error on appeal constituted ineffective assistance of counsel.

D. The Failure of Mu'Min's Counsel to Object to the Definition of Reasonable Doubt Employed by the Trial Court Resulted in Ineffective Assistance of Counsel.

The trial court's instruction regarding the definition of reasonable doubt impermissibly lessened the state's burden of proof because it relieved the state of proving each and every element of guilt beyond a reasonable doubt. The court instructed the jury that the Commonwealth must prove:

> ... each and every element of the offense beyond a reasonable doubt.
>
> This does not require proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence.

This instruction relieved the state of its constitutionally-imposed burden of proving every aspect of Mu'Min's guilt beyond a reasonable doubt. The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970); Jackson v. Virginia, 443 U.S. 307, 315-16 (1979).

This Court, in an unanimous opinion, has condemned a reasonable doubt instruction which is similar to the one given at Mu'Min's trial. Cage v. Louisiana, 498 U.S. 39 (1990). In Cage, this Court found objectionable the portion of the charge which equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and which further stated that what was required was

a "moral certainty" that the defendant was guilty. The Court concluded that it was "clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt on a degree of proof below that required by the Due Process Clause." 498 U.S. at 41.[10]

A reasonable juror in Mu'Min's case could have concluded that a "doubt based on your sound judgment" coupled with the additional language set forth in the instruction would require some lesser degree of doubt before the jury could return a guilty verdict. This would have improperly allowed a finding of guilt "on a degree of proof below that required by

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[10] Additionally, on June 1, 1993, this Court held unconstitutional a reasonable doubt instruction which was "essentially identical" to the instruction challenged in Cage. Sullivan v. Louisiana, 113 S. Ct. 2078 (1993). The Court held that a constitutionally deficient reasonable doubt instruction cannot be harmless error.

the Due Process Clause." Cage, 498 U.S. at 41. This dilution of the burden of proof violated Mu'Min's constitutional right to a fair trial.

Trial counsel's failure to object to the reasonable doubt instruction was tantamount to ineffective assistance of counsel.

E. The Failure of Mu'Min's Counsel to Object to Certain Issues Regarding the Vileness Aggravating Circumstance in the Virginia Death Penalty Statute Constituted Ineffective Assistance of Counsel.

Mu'Min's trial counsel raised on appeal an issue regarding the trial court's granting of a penalty phase instruction concerning torture as it related to the "vileness" aggravating circumstance. Counsel, however, failed to object to the instruction as it pertained to a jury finding involving "depravity of mind" on Mu'Min's part, when there was no

evidence that Mu'Min was depraved. The jury was therefore improperly permitted to find vileness on Mu'Min's part in this action in violation of Mu'Min's Eighth and Fourteenth Amendment rights. Counsel's failure to object to the instruction on this basis constituted ineffective assistance of counsel.

F. The Failure of Mu'Min's Counsel to Object to the Jury Verdict Form Amounted to Ineffective Assistance of Counsel.

Both the jury verdict form and the Virginia death penalty statute impermissibly limit the consideration of mitigating factors by the jury, contrary to Virginia and federal law. See Lockett, supra. Specifically, if the jury finds the defendant to be dangerous in the future, the jury verdict form mandates a death sentence. In the absence of an option on the form which allows the jury to find that an individual will pose a

future danger, but that mitigating factors still dictate that a sentence less than death should be imposed, both the form and statute fail to provide the jury with a vehicle to "give effect to mitigating evidence ... by declining to impose the death penalty ...". Penry v. Lynaugh, 492 U.S. 302, 328 (1989).

Although the jury verdict form used by the trial court complied with Va. Code § 19.2-264.4(d), it prevented the jury from giving effect to mitigating evidence once it found an aggravating factor, and thereby dictated a mandatory and arbitrary death sentence upon the finding of future dangerousness. Thus, the use of the form violated Mu'Min's constitutional rights.

Mu'Min's trial counsel failed to object to the use of this form. That failure rose to the level of ineffective assistance of counsel.

G. The Failure of Mu'Min's Counsel to Object To and Appeal The Trial Court's Failure to Define "Life Sentence" for The Jury Amounted to Ineffective Assistance of Counsel.

During the penalty phase of the trial, the jury interrupted its deliberations to request a definition from the court on the meaning of a "life sentence." Presumably, at least one juror had reservations about a sentence of death. The trial court, however, refused to answer the question. The judge also advised that should the jury should not be concerned about it.[11] Therefore, the jury was allowed -- and even encouraged -- to

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[11] Such a comment could at best only leave the impression in the minds of the jurors that their decision regarding the defendant's life was unimportant. At worst, it indicates that the judge did not consider life imprisonment to be a proper penalty for the defendant; thus, it was not one that the jury should be "concerned about." Even the possibility that the jury was left with such an impression was prejudicial to Mu'Min and denied his rights to due process and to a fair and impartial hearing.

employ speculation and guesswork in its penalty deliberations.

Death penalty schemes are required to allow consideration "as a mitigating factor, [of] any aspect of the defendant's character, record or circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett, 438 U.S. at 604. The fact that a defendant will remain incarcerated for life should be taken into consideration as a non-statutory mitigating factor.[12] Any concern about Mu'Min's future dangerousness, for example, may have been defused if the jury had been given accurate information about his eligibility for parole. The failure

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[12] This Court has ruled that a jury may be informed about applicable state law on parole so that it has "accurate information for its deliberation in selecting an appropriate sentence." California v. Ramos, 463 U.S. 992, 1009 (1983).

of the judge to define "life sentence" thus interfered with Mu'Min's ability to rebut the State's assertion that he posed a future danger to society and unconstitutionally prevented the jury's consideration of a factor which it may have determined to mitigate against recommendation of the death penalty in this case.

The failure of trial counsel to object to and raise on direct appeal the trial judge's refusal to answer the jury's question constituted ineffective assistance of counsel.

H. The Failure of Mu'Min's Counsel to Raise on Appeal Certain Issues Regarding Future Dangerousness Resulted in Ineffective Assistance of Counsel.

The Virginia statute concerning the aggravating circumstance of future dangerousness, both on its face and as applied, is vague, ambiguous, and overbroad, denies due process of law, does not adequately limit and guide the jury's exercise of discretion, and invites the arbitrary imposition of the death penalty.

Trial counsel objected to and raised on appeal the unconstitutionality of the future dangerousness predicate on the basis that it failed to establish a standard of proof for the jury. Trial counsel failed, however, to object to certain other constitutional infirmities in the future dangerousness predicate.

The language of the statute is vague on its face, making the Virginia Supreme Court's proportionality review a meaningless exercise. This Court has consistently recognized that "[u]nder the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'" Caldwell v. Mississippi, 472 U.S. 320, 329 (1985). Specifically, this Court has held that the capital sentencing process "should facilitate the responsible and reliable exercise of sentencing discretion." Id.

Thus, the aggravating circumstances defined in death penalty statutes must adequately inform juries about what they must find in order to impose the death penalty. Stringer v. Black, 112 S. Ct. 1130 (1992). A "standard" circumstance which does not inform juries of the

objective findings that they must make before recommending the death penalty in a particular case "leaves them and appellate courts with the kind of open-ended discretion which this Court held invalid in Furman v. Georgia, 408 U.S. 238 (1972)." Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988).

The Virginia Code authorizes the imposition of the death penalty if the Commonwealth proves beyond a reasonable doubt that "there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society ...". Va. Code § 19.2-264.4. However, neither the statute nor the instructions given the jury in this case define objective factors that might

channel the jurors' discretion in considering the "aggravating circumstance."[13]

Moreover, the Virginia Supreme Court's failure to adopt a limiting construction of the future dangerousness predicate has led to it being applied inconsistently. The Virginia Supreme Court has embraced a totality-of-the-circumstances inquiry that results in a standardless, ad-hoc judgment as to whether the evidence supports a finding of

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[13] There is an inherent illogic in predicating the sentence of death upon proof beyond a reasonable doubt that there is a "probability" that the defendant will commit acts of violence. The level of "probability" is vague and over-inclusive in its application. By permitting the sentence of death to be imposed based upon a finding of "probability," the Commonwealth is relieved of the burden of proving future dangerousness beyond a reasonable doubt. Moreover, even the standard of proof for establishing future dangerousness is indeterminate. Va. Code § 19.2-264.4 requires proof beyond a reasonable doubt, but § 19.2-264.2, which addresses aggravating circumstances, does not impose this or any other standard.

future dangerousness. Edmonds v. Commonwealth, 329 S.E.2d 807 (1985) (stating that a finding of future dangerousness can be based on virtually any relevant evidence), cert. denied, 474 U.S. 975 (1985). Absent effective limiting instructions, rational jurors could conclude that anyone convicted of murder would pose a continuing threat to society. As a result of the failure of the Virginia courts to narrow the definition of future dangerousness by utilizing limiting instructions, the death penalty in Virginia is applied in an arbitrary, capricious and over-inclusive manner.

Trial counsel's failure to object to these constitutional infirmities in the future dangerousness predicate amounts to ineffective assistance of counsel.

CONCLUSION

WHEREFORE, for these reasons Dawud Majid Mu'Min respectfully requests this Court to grant him a Writ of Certiorari to the Virginia Supreme Court's affirmance of the trial court's denial of his Amended Petition for Habeas Corpus.

Respectfully submitted,

R. Terrence Ney
(Counsel of Record)
M. Melissa Glassman
McGuire, Woods, Battle & Boothe
8280 Greensboro Drive, Suite 900
McLean, Virginia 22102
(703) 712-5000
Counsel for Petitioner

PROOF OF SERVICE

In accordance with Rule 29(3)(c) of the Rules of the United States Supreme Court, I hereby certify under penalty of perjury that on this 3rd day of January, 1994 three (3) copies of this Petition for a Writ of Certiorari were mailed, first-class, postage prepaid to John McLees, Esquire, Assistant Attorney General for the Commonwealth of Virginia, Supreme Court Building, 101 North Eighth Street, Richmond, Virginia 23219, (804) 786-4624. Mr. McLees represents Edward W. Murray, Director, Virginia Department of Corrections, Respondent. All parties required to be served have been served.

R. Terrence Hoey

APPENDIX

TABLE OF CONTENTS

Page

Order of the Supreme Court of Virginia, October 4, 1990 1

Order of the Circuit Court of Prince William County, March 10, 1990 . . . 5

Excerpts from Petitioner's Amended Petition for a Writ of Habeas Corpus Ad Subjiciendum 11

Excerpts from Oral Arguments Before the Circuit Court of Prince William County, March 10, 1990 14

Excerpts from Mu'Min's Petition for Appeal to Supreme Court of Virginia . 35

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 4th day of October, 1993.

Dawud Majid Mu'Min, Appellant,

against Record No. 930811
Circuit Court No. L29689

Edward W. Murray, Director,
Virginia Department of Corrections,
Appellee.

From the Circuit Court of

Prince William County

Upon consideration of the record, the briefs filed herein, argument in support of an in opposition to the granting of an appeal, the Court is of opinion the circuit court did not err in dismissing appellant's claims for reasons of procedural default (assignment of error No. 1), and that there is no reversible error in the judgment complained of.

The Court applies the rule in Hawks v. Cox, 211 Va. 91, 175 S.E.2d 271 (1970) to assignment of error No. 2 to the extent it raises an issue of state evidentiary law, to assignment of error No. 4 insofar as it concerns the failure of the trial court to excuse for cause two members of the venire, to assignment of error No. 7 to the extent it challenges the facial constitutionality of the "future dangerousness" predicate and the constitutionality of the "vileness" predicate as applied in this case, and to assignment of error No. 8 to the extent it raises the issue of cruel and unusual punishment and the failure to require detailed findings by the jury and the trial court.

The Court applies the rule in Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680

(1974), cert. denied, 419 U.S. 1108 (1975), to assignment of error Nos. 3, 5 and 6, and to assignment of error No. 2 to the extent it raises an issue of federal constitutional law, to assignment of error No. 4 to the extent it raises issues of change of venue and individual voir dire, to assignment of error No. 7 to the extent it claims the jury was allowed to sentence appellant to death based upon a finding of depravity of mind (under the "vileness" predicate) when the evidence did not support such a finding, and to assignment of error No. 8 to the extent it challenges the adequacy of appellate review in capital cases.

The Court finds no merit in assignment of error No. 9. Strickland v. Washington, 466 U.S. 668 (1984).

Accordingly, the Court refuses the petition for appeal.

The said circuit court shall allow court-appointed counsel the fee of $400 and also their necessary direct out-of-pocket expenses.

A Copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

DAWUD MAJID MU'MIN,

Petitioner,

v. LAW NO. 29689

EDWARD W. MURRAY, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

ORDER

Upon mature consideration of the pleadings and exhibits, and of the record of trial in petitioner's criminal case, the Court is of the opinion, for the reasons stated in respondent's motion to dismiss, that the petitioner is not entitled to the relief sought.

The Court finds that petitioner's claims II, III, VI, VII, VIII, IX, XII, claim I insofar as it complains that the

trial court did not allow individual voir dire, claim IX except to the extent that it argues that the Virginia future dangerousness predicate is unconstitutional because it fails to establish a standard of proof for the jury, claim X insofar as it complains that the "vileness" aggravating circumstance was unconstitutionally applied because the jury was permitted to sentence him to death based on depravity of mind when there was no evidence of depravity of mind, and claim XIII except to the extent that it argues that the Virginia death penalty laws are unconstitutional because they fail to require detailed findings by the jury and the sentencing judge in support of the sentence, are barred by reason of procedural default. Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680

(1974), cert. denied, 419 U.S. 1108 (1975).

The Court further finds that claims V and XI and claim I insofar as it raises an issue of state evidentiary law, claim IV insofar as it complains that Mu'Min was not allowed on voir dire to probe the content of publicity to which the jurors had been exposed, claim IX to the extent that it argues that the future dangerousness predicate is unconstitutional because it fails to establish a standard of proof for the jury, claim X to the extent that it argues that the vileness predicate was unconstitutionally applied because it permitted a death sentence based on torture when torture was not included in the bill of particulars and the evidence did not establish torture, and claim XIII

insofar as it argues that Virginia law is unconstitutional because it fails to require detailed findings by the jury and the sentencing judge in support of sentence, were decided on direct appeal and are therefore not cognizable in state habeas corpus review. Hawks v. Cox, 211 Va. 91, 175 S.E.2d 271 (1970).

The Court further finds that claim XIV, the petitioner's claim of ineffective assistance of counsel, is without merit, Strickland v. Washington, 466 U.S. 668 (1984), and that all his other claims are meritless as well.

The Court further hereby finds as a matter of fact, having presided over petitioner's criminal trial, that, had counsel requested the cautionary instruction which petitioner maintains in claim XIV A that counsel should have

requested, and had such instruction been given, there is no reasonable probability that the outcome of petitioner's trial would have been different.

Now, therefore, it is ORDERED and ADJUDGED that the petition for writ of habeas corpus is denied and dismissed. Petitioner's exception is noted.

It is further ORDERED that the Clerk serve by mail certified copies of this Order upon M. Melissa Glassman, Esquire, counsel for petitioner, and upon John H. McLees, Jr., Assistant Attorney General, counsel for respondent.

Entered this 10th day of March, 1993.

_____

H. Selwyn Smith, Judge

I ask for this:

_____

John H. McLees, Jr.
Counsel for Respondent

Seen and objected to as to the Court's Rulings as they regard claims I, II, III, IV, V, VI, VII, IIX, IX, X, XI, XII, XIII, XIV.

_____

M. Melissa Glassman
Counsel for Dawud Mu'Min

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

DAWUD MAJID MU'MIN,	)	
	)	
Petitioner,	)	
	)	No. 29689
v.	)	
	)	
EDWARD W. MURRAY, Director Virginia Department of Corrections	)	
	)	
	)	
Respondent.	)	

EXCERPTS FROM PETITIONER'S AMENDED PETITION FOR A WRIT OF HABEAS CORPUS AD SUBJICIENDUM

XIV. MU'MIN WAS DENIED REASONABLY EFFECTIVE ASSISTANCE OF COUNSEL

1. Mu'Min was denied the effective assistance of counsel at the trial at which guilt was determined, at the trial at which the penalty was determined, at the sentencing hearing, and on appeal to the Virginia Supreme Court. Said ineffective assistance of counsel was in

violation of rights guaranteed by the Fifth, Sixth, Eight and Fourteenth Amendments to the United States Constitution, and Article I, Sections 8, 9 and 11 of the Virginia Constitution.

2. The United States Constitution guarantees a criminal defendant the right to be represented by counsel. This right is the most basic component of our criminal justice system. See U.S. Const. amend. VI. The decisions of the United States Supreme Court have repeatedly emphasized the "fundamental" role of counsel to a fair trial. See, e.g., United States v. Cronic, 466 U.S. 648 (1984); Argersinger v. Hamlin, 407 U.S. 24, 31 (1972); Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963). The basic theme of these cases is that counsel is the means through which other rights of the

person on trial are secured. Cronic, 466 U.S. at 653; see also United States v. Ash, 413 U.S. 300, 307 (1973) (counsel serves as a "guide through complex legal technicalities"). It is for this reason that our system of criminal justice presumes that counsel will act as an accused's forceful and undivided advocate. Anders v. California, 386 U.S. 738 (1967). The right to counsel, of course, incorporates the right to the effective assistance of counsel. Strickland v. Washington, 446 U.S. 668 (1984).

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

DAWUD MAJID MU'MIN,	:	
Petitioner,	:	
versus,	:	AT LAW NO. 29689
EDWARD W. MURRAY, Director Virginia Department of Corrections	:	
Respondent.	:	

Manassas, Virginia
Wednesday, March 10, 1993

The above entitled action came on to be heard before the Honorable H. Selwyn Smith, a Judge in and for the Circuit Court of Prince William County, in Courtroom 3, at 9311 Lee Avenue, Prince William County Judicial Center, Manassas, Virginia 22110, beginning at approximately 10:31 a.m.

APPEARANCES:

For the Petitioner:

M. MELISSA GLASSMAN, ESQUIRE
McGuire, Woods, Battle & Boothe
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Suite 900, Tysons Corner
McLean, Virginia 22102

For the Respondent:

JOHN McLEES, ESQUIRE
Assistant Attorney General
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

P R O C E E D I N G S:

(The court reporter was sworn.)

THE COURT: This is the matter of Dawud Majid Mu'Min, Petitioner, versus Edward W. Murray, Director of Virginia Department of Corrections, law action number 29689 in the Circuit Court of Prince William.

Let the record reflect that present for Mr. Dawud Mu'Min is Melissa Glassman. Is that right?

MS. GLASSMAN: Yes sir

THE COURT: Of the McGuire, Woods and Battle office in Fairfax.

And representing the Director of the Virginia Department of Corrections is Mr. John McLees of the Attorney General's office.

Is that stated correctly, counsel?

MS. GLASSMAN: Yes, sir.

MR. McLEES: Yes, sir

. . .

MS. GLASSMAN: For the record, Your Honor, I am Melissa Glassman. I represent the petitioner, Dawud Mu'Min.

. . .

Now, here Mr. Mu'Min was not afforded a fair and full opportunity to have heard his ineffective assistance of counsel claims or his claims regarding the effectiveness of the appellate review of his sentence.

As Your Honor knows, on direct appeal the defendant is limited to facts that are in record at the time of the trial. Matters outside the record can only be considered upon a writ of habeas corpus where the Circuit Court can then develop those facts and have them put into a record.

Claims concerning ineffectual assistance of counsel could not have been considered on direct appeal because the relevant facts were not in the record. Nothing in the trial record would show why counsel failed to make certain objections at certain times or why counsel failed to appeal certain issues in this suit. This is the first opportunity that Mr. Mu'Min would have to have brought these types of claims.

. . .

And for these reasons Mr. Mu'Min respectfully requests this Court to have an evidentiary hearing on the issues raised in its amended petition for habeas corpus.

THE COURT: Am I entitled to rely at all upon what he personally had to say at his trial when I am reasonably certain that the record will reflect that he was asked before the jury verdict whether he was satisfied with the representation of his two counsel at the time? I think the record is going to reflect that he indeed was. Isn't that correct?

MS. GLASSMAN: I don't remember that, Your Honor, but I would not be surprised at all if you had asked him that based on what you did today.

However, Your Honor, I would submit that Mr. Mu'Min is not an attorney. Mr. Mu'Min -

THE COURT: Well, Mr. Mu'Min has been through the system before --

MS. GLASSMAN: Yes sir.

THE COURT: -- and he bragged about the fact that at one time he spoke seven languages. He was a college graduate and he was very affluent, and he was a learned individual. I recognize the fact that maybe he had a higher evaluation of his abilities than what some others might have.

But the fact remains, is not one entitled to rely upon that?

MS. GLASSMAN: Yes, sir. Let me bring up one point.

THE COURT: Well, let me finish.

MS. GLASSMAN: I am sorry.

THE COURT: Then it brings me to this. Is this his appeal or somebody else's appeal for him or talking him into it?

MS. GLASSMAN: This is Mr. Mu'Min's appeal, Your Honor. In fact I was appointed his counsel. Mr. Mu'Min went to the American Bar Association Post Conviction Representation Project and asked specifically to have counsel appointed for him.

THE COURT: All right.

MS. GLASSMAN: And then through my involvement with the ABA I was appointed counsel then by you.

The point I was going to make before is one of the issues that we are bringing up as far as ineffective assistance is concerned is the failure of counsel to appeal your denial for a change of venue.

That was brought up at trial but it was not appealed.

Now, at trial when you asked Mr. Mu'Min if he was satisfied with his representation, up to that point he had no way of knowing at that time that his counsel would not be appealing this issue with regard to a change of venue.

THE COURT: Well, it is rather ironic that you would argue that when right now all of the news is about the Rodney King case in California in which there was a change of venue. There was an adverse decision and the Federal government saw fit to come back to the place where it should have been in the first instance and where it would have been in the first instance I suspect had the decision of the Supreme Court of the United States in this case been out at that time.

MS. GLASSMAN: Yes, sir.

THE COURT: No, they didn't appeal it and we didn't have any trouble getting a jury either.

. . .

MR. MCLEES:

. . .

Now, with respect to the ineffective assistance of counsel claim, which is really the only one that is before Your Honor that is not procedurally barred, they claim first that counsel was ineffective because when the evidence was submitted to the jury in the guilt phase that Mr. Mu'Min was a convicted murderer serving a forty-eight year sentence counsel didn't ask the Court to give a limiting instruction to the effect that that can only be considered for the purpose of documenting his status as a

prisoner and can't be considered on guilt or innocence.

Well, there are several responses to this.

First, as Your Honor knows, and as the Supreme Court of Virginia expressly recognized in the Manetta case, which is cited in our motion to dismiss, counsel may have good tactical reasons for not asking for a limiting instruction when evidence comes in that is admissible only for a limited purpose.

Counsel can ask for a limiting instruction if they think it will help. But if they choose not to the Supreme Court has recognized that there is a perfectly respectable school of thought among defense lawyers that the limiting instruction simply draws the jury's attention to that evidence which the

defense would rather they didn't consider at all and is not effective in confining their consideration of that evidence.

And so as a matter of law we contend that it is a reasonable tactical choice if defense counsel chooses not to ask for a limiting instruction.

Our second response to it is whether it was a reasonable tactical choice in that case in that situation or not, the jury heard, again, the same evidence, substantially the same evidence, when the evidence came in about the statement Mu'Min had given to the detective where he said he wiped his fingerprints off of things because he is a convicted murderer serving a penitentiary sentence and they never would have believed him.

And, again, no limiting instruction would have been available on that

information because that was admissible generally. That is not admissible for a limited purpose. It was general evidence and it went to guilt or innocence.

And our third response on the ineffective assistance of counsel claim and pertaining to the limiting instruction is that had counsel asked for the limiting instruction, and had Your Honor given it, there is still no reasonable likelihood that the outcome of the case would have been different for Mu'Min.

The evidence was overwhelming This is an issue that goes only to guilt of capital murder. This man sharpened a tool ahead of time and went to this lady's store and robbed her and murdered here. He admittedly caused her death through his own hand. He admittedly took money from the premises. He admittedly was the one

to strike the first blow even if the jury believed his scurrilous story about what she said to him.

THE COURT: He also admitted that he entertained the thoughts of having sex with her after she was down.

MR. McLEES: Exactly. Exactly. And there is no reasonable likelihood of any different outcome on guilt. And certainly his whole criminal history was properly admissible on sentencing and they would have heard the same thing any how on sentencing.

And so on that we are asking the Court not only to make the other findings that we have requested, but we are asking Your Honor as the judge who presided at the trial to make a finding of fact that had counsel added that instruction and had the instruction been given, there is no

reasonable likelihood that the outcome of the trial would have been different.

That is a factual issue, and Your Honor having personally presided over the trial, we believe that you can make that factual finding.

The other ineffective assistance of counsel claims are things that are added simply to get around the bar of Slayton versus Parrigan, but these substantive claims were not raised at trial and on direct appeal.

And to the limited extent they do get around the bar. They raise it as an ineffective assistance of counsel claim, not as a substantive claim. But counsel can't be held ineffective for failing to raise a claim or make an objection or make a motion which is meritless, which should not have been granted had it been made.

And because none of these claims or objections or motions that they say counsel should have made had any merit to them, counsel can't be held ineffective for not making them.

Furthermore, we contend that had counsel done all of the things there is still no reasonable likelihood shown that the outcome of the trial would have been different.

And so we just ask Your Honor to deny and dismiss the writ. We have a draft order prepared.

Thank you.

THE COURT: All right. Ms. Glassman, do you wish to respond?

MS. GLASSMAN: Just very briefly.

Mr. McLees says that the claims raised by Mu'Min in his amended petition

with regard to ineffective assistance of counsel are meritless.

I don't think that that is a decision that can be made at this hearing, Your Honor. I think that that is a situation upon which you must hold an evidentiary hearing to find out, to examine, to determine if this claim should be meritless.

I think that there is a very good likelihood that had the jury not heard that Mr. Mu'Min had been previously convicted of first degree murder and was serving a sentence for that time during the time of the Nopwasky incident that there is a very reasonable likelihood that they might not have found him --

THE COURT: Where is that evidence going to come from in an evidentiary hearing?

MS. GLASSMAN: Well, I think Your Honor we would talk to jurors.

THE COURT: I was present and heard the whole trial.

MS. GLASSMAN: I understand that, Your Honor. But at a evidentiary hearing I think we would have the opportunity to bring in jurors to testify, Yes, if I hadn't heard that my decision may have been different.

THE COURT: But their decision was what it was at the time. And counsel chose not to request the cautionary instruction.

As a matter of fact I think, and again I am relying on my memory, but I think that the record would reflect that counsel started out or asserted during the course of Mr. Mu'Min's testimony the fact that he was a convicted murderer and

serving a period of time for it. That is what he is in the penitentiary for.

As I recall, and I hope I am not mistaken in this because I haven't reviewed the record, but as I recall I think it was tactically decided that the best thing to do was bring it out up front because it was going to come out and would have to come out that he was on a work release detail from a prison camp at the time.

MS. GLASSMAN: Well, if that is the case, Your Honor, then I would submit that that is probably ineffective assistance because all the Commonwealth needed to prove in that case was the fact of the incarceration. You could have stipulated to the fact of incarceration at the time.

But to let the jury know why this individual was incarcerated I submit to you is prejudicial beyond belief.

THE COURT: But on the other hand they knew that he had already made this spontaneous statement to the investigator in an attempt to explain how he found this lady in the first instance.

MS. GLASSMAN: The statement that he -

THE COURT: I am not going to argue with you. Go ahead, ma'am.

MS. GLASSMAN: I was just going to say that the statement that he made to Investigator Watson was exactly as you say, basically to explain why he was there in the first place. This statement -- It was a statement of common knowledge. Investigator Watson knew that he was in jail and of course Mr. Mu'Min knew, and

they both knew why and what sentence he was serving.

But the statement made to Investigator Watson was made for a totally different purpose. It was just a statement of fact, I'm in there, I'm in prison, or, I was in prison. It is a matter of common knowledge.

And that has a totally different effect on a jury who being told for the first time that, yes, this fellow was in jail for first degree murder. I mean that has a highly prejudicial effect.

And I think that that in itself would probably go to show ineffective assistance more than anything else.

But my point in all of this, Your Honor, is that I think that as to these claims that Your Honor should have a preliminary hearing so we can determine

the level of the ineffective assistance and the effect that it had on the entire outcome of the trial.

. . .

CERTIFICATE OF COURT REPORTER

I, LILLIAN H. CRABILL, a verbatim court reporter, do hereby certify that I took the notes of the foregoing hearing by Stenomask and reduced the same to typewriting; that the foregoing is a true record of said hearing to the best of my knowledge and ability; that I am neither related to nor employed by any attorney or counsel employed by the parties thereto; nor financially or otherwise interested in the action.

/s/ Lillian H. Crabill

LILLIAN H. CRABILL
Court Reporter

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

DAWUD MAJID MU'MIN,)
)
Petitioner,)
) No. -
v.)
)
EDWARD W. MURRAY, Director)
Virginia Department of)
Corrections)
)
Respondent.)

EXCERPTS FROM MU'MIN'S PETITION FOR APPEAL

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Counsel for Petitioner

IX. **MU'MIN WAS DENIED REASONABLY EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.**

Mu'Min was denied the effective assistance of counsel during the guilt and sentencing phases of trial, at the sentencing hearing, and on appeal to the Virginia Supreme Court. The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to be represented by counsel, a right which has been recognized as the most basic component of our criminal justice system. The United States Supreme Court has repeatedly emphasized the "fundamental" role of effective representation by counsel in order to receive a fair trial.[1] That Court has also recognized that counsel is the means through which other rights of the

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[1] See, e.g., United States v. Cronic, 466 U.S. 648 (1984); Argersinger v. Hamlin, 407 U.S. 24, 31 (1972); Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963).

person on trial are secured,[2] and that our system of criminal justice presumes that counsel will act as an accused's forceful and undivided advocate. Anders v. California, 386 U.S. 738 (1967). Clearly, the right to counsel contemplates the right to the effective assistance of counsel. Strickland v. Washington, 446 U.S. 668 (1984).

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[2] Cronic, 466 U.S. at 653; see also United States v. Ash, 413 U.S. 300, 307 (1973) (counsel serves as a "guide through complex legal technicalities").

Supreme Court, U.S.
FILED
MAR 14 1994
OFFICE OF THE CLERK

No. 93-1141

In The

Supreme Court of the United States

October Term, 1993

DAWUD MAJID MU'MIN,

Petitioner,

v.

EDWARD W. MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant certiorari to review Mu'Min's plethora of fact-specific ineffective assistance of counsel claims?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF THE CASE 1

ARGUMENT 2

I. NO ISSUE WORTHY OF THIS COURT'S REVIEW ON CERTIORARI IS PRESENTED BY THE STATE COURT'S REJECTION OF MU'MIN'S HABEAS PETITION 2

II. TRIAL DEFENSE COUNSEL HAD NO REASON TO BELIEVE THAT MU'MIN WOULD BENEFIT BY ANY OF THE CLAIMS WHICH MU'MIN NOW SAYS COUNSEL SHOULD HAVE ASSERTED 2

A. COUNSEL'S ELECTION NOT TO APPEAL THE DENIAL OF CHANGE OF VENUE ... 3

B. COUNSEL'S ELECTION NOT TO REQUEST AN ADDITIONAL LIMITING INSTRUCTION CONCERNING CONSIDERATION OF MU'MIN'S PREVIOUS MURDER CONVICTION 5

C. ABSENCE OF ADDITIONAL MITIGATION INSTRUCTIONS 6

D. REASONABLE DOUBT INSTRUCTION 6

E. "VILENESS" INSTRUCTION CONCERNING DEPRAVITY OF MIND 7

F. JURY VERDICT FORM 8

G. JURY QUESTION ABOUT THE MEANING OF A LIFE SENTENCE 9

H. "FUTURE DANGEROUSNESS" PREDICATE 11

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Barefoot v. Estelle, 463 U.S. 880 (1983) 11

Briley v. Bass, 750 F.2d 1238 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985) 11

Cage v. Louisiana, 111 S.Ct. 328 (1990) 7

Clanton v. Muncy, 845 F.2d 1238 (4th Cir. 1988), *cert. denied*, 485 U.S. 1000 (1988) 8

Darden v. Wainwright, 477 U.S. 168 (1986) 5, 10

Engle v. Isaac, 456 U.S. 107 (1981) 3, 5, 10

Giarratano v. Procunier, 891 F.2d 483 (4th Cir. 1989), *cert. denied*, 498 U.S. 881 (1990) 11

Hill v. Lockhart, 474 U.S. 52 (1985) 10

Hinton v. Commonwealth, 219 Va. 492, 247 S.E.2d 704 (1978) 10

Honeycutt v. Mahoney, 698 F.2d 213 (4th Cir. 1983) 10

Irvin v. Dowd, 366 U.S. 717 (1961) 3

Johnson v. Texas, 113 S.Ct. 2658 (1993) 6

Jones v. Barnes, 463 U.S. 745 (1983) 3, 4

Jones v. Murray, 947 F.2d 1106 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 1591 (1992) 6

Jurek v. Texas, 428 U.S. 262 (1976) 11

Kimmelman v. Morrison, 477 U.S. 365 (1986) 3

Lindsey v. Smith, 820 F.2d 1135 (8th Cir. 1987) 3

Lockhart v. Fretwell, 113 S.Ct. 838 (1993) 3

TABLE OF AUTHORITIES – Continued

Page

Maggio v. Williams, 464 U.S. 46 (1983) 6

McMann v. Richardson, 397 U.S. 759 (1970) 10

Mu'Min v. Commonwealth, 239 Va. 443, 389 S.E.2d 886 (1990) 5

Mu'Min v. Virginia, 111 S.Ct. 1899 (1991) 1, 4

Mueller v. Commonwealth, 244 Va. 409, 422 S.E.2d 380 (1992), *cert. denied*, 113 S.Ct. 1880 (1993) .. 5, 8, 9

Murphy v. Florida, 421 U.S. 794 (1975) 4

O'Dell v. Commonwealth, 234 Va. 672, 364 S.E.2d 491 (1988), *cert. denied*, 488 U.S. 871 (1988) 7

Peterson v. Murray, 904 F.2d 882 (4th Cir.), *cert. denied*, 111 S.Ct. 537 (1990) 10

Pruett v. Thompson, 996 F.2d 1560 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 487 (1993) 6

Ramdass v. Commonwealth, ___ Va. ___, 437 S.E.2d 566 (1993) 9

Ross v. Moffitt, 417 U.S. 600 (1974) 2

Simmons v. South Carolina, No. 92-9059 10

Spencer v. Murray, 5 F.3d 758 (4th Cir., Sept. 16, 1993) 11

Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808 (1979), *cert. denied*, 445 U.S. 972 (1980) 9

Strickland v. Washington, 466 U.S. 668 (1984) 8

Thomas v. Commonwealth, 244 Va. 1, 419 S.E.2d 606 (1992), *cert. denied*, 113 S.Ct. 421 (1992) 8

TABLE OF AUTHORITIES – Continued

Page

Turner v. Williams, 812 F.Supp. 1400 (E.D. Va. 1993) 10

United States v. Johnston, 268 U.S. 220 (1925) 2

Washington v. Murray, 952 F.2d 1472 (4th Cir. 1991) 3

Watkins v. Commonwealth, 229 Va. 469, 331 S.E.2d 422 (1985), *cert. denied*, 475 U.S. 1111 (1985) 9

Zant v. Stephens, 462 U.S. 862 (1983) 6

OTHER AUTHORITIES

Sup.Ct.R. 10.1 2

Va. Code § 53.1-151C (Cum. Supp. 1988) 10

STATEMENT OF THE CASE

This Court is already familiar with the facts of this case from its affirmance of the judgment of the Supreme Court of Virginia in Mu'Min's direct appeal:

> Mu'Min was an inmate at the Virginia Department of Corrections' Haymarket Correctional Unit serving a 48-year sentence for a 1973 first-degree murder conviction. On September 22, 1988, he was transferred to the Virginia Department of Transportation (VDOT) headquarters in Prince William County and assigned to a work detail supervised by a VDOT employee. During his lunch break, he escaped over a perimeter fence at the VDOT facility and made his way to a nearby shopping center. Using a sharp instrument that he had fashioned at the VDOT shop, Mu'Min murdered and robbed Gladys Nopwasky, the owner of a retail carpet and flooring store. Mu'Min then returned to his prison work crew at the VDOT, discarding his bloodied shirt and the murder weapon near the highway.

Mu'Min v. Virginia, 111 S.Ct. 1899 at 1901 (1991).

In August, 1992, Mu'Min filed in the Circuit Court for Prince William County a petition for writ of habeas corpus. After amending the petition in December, 1992, Mu'Min asserted 13 substantive claims and 9 claims of ineffective assistance of counsel, each of which was based on a motion, objection, or other request which Mu'Min contended counsel should have asserted in the trial court and preserved on direct appeal.

The circuit court found that none of Mu'Min's ineffective assistance of counsel claims stated facts which, if true, would support habeas corpus relief, and denied and

dismissed the habeas claims on their merits without an evidentiary hearing. The Supreme Court of Virginia affirmed the circuit court in an unpublished order.

ARGUMENT

I. NO ISSUE WORTHY OF THIS COURT'S REVIEW ON CERTIORARI IS PRESENTED BY THE STATE COURT'S REJECTION OF MU'MIN'S HABEAS PETITION.

Mu'Min's claims do not present "special and important reasons" for this Court to exercise its certiorari powers. Certiorari will be granted only when such reasons are present. Sup.Ct.R. 10.1. This Court does not exercise its certiorari power merely to review perceived error. *See Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974); *see also United States v. Johnston*, 268 U.S. 220 (1925) (Court does not grant certiorari to review evidence and discuss specific facts).

II. TRIAL DEFENSE COUNSEL HAD NO REASON TO BELIEVE THAT MU'MIN WOULD BE BENEFITTED BY ANY OF THE CLAIMS WHICH MU'MIN NOW SAYS COUNSEL SHOULD HAVE ASSERTED.

The state courts correctly rejected Mu'Min's ineffective assistance of counsel claims, finding no substantive merit in any of the underlying motions or objections which Mu'Min now claims counsel should have made. Counsel cannot be held ineffective for failing to raise a

meritless or groundless motion or objection. *See Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986); *Washington v. Murray*, 952 F.2d 1472, 1481 (4th Cir. 1991); *Lindsey v. Smith*, 820 F.2d 1135, 1152 (8th Cir. 1987); *see also Lockhart v. Fretwell*, 113 S.Ct. 838, 842-43 (1993).

Essentially, Mu'Min contends that counsel was ineffective for failing to urge upon the trial court and the Supreme Court of Virginia on direct appeal various expansions, modifications, or reversals of existing case law, none of which has been accepted by this Court or by the Virginia courts even as of February 1994. The Sixth Amendment, however, does not require that counsel be a visionary, or that counsel exercise clairvoyance in foreseeing distant future changes in the law. Mu'Min's trial defense counsel exercised reasonable trial strategy, and selectively pursued those points which they reasonably deemed would most likely be of benefit to their client. *See Jones v. Barnes*, 463 U.S. 745, 751-52 (1983); *Engle v. Isaac*, 456 U.S. 107, 134 (1981). The soundness of their judgment in this regard is demonstrated by their success in crafting and preserving a claim on direct appeal which this Court deemed worthy of its rare grant of certiorari review.

A. COUNSEL'S ELECTION NOT TO APPEAL THE DENIAL OF CHANGE OF VENUE

In affirming Mu'Min's conviction and sentence of death on certiorari review of his direct appeal, this Court contrasted the pre-trial publicity in this case and that in *Irvin v. Dowd*, 366 U.S. 717 (1961), in which a change of venue was held constitutionally required: "While news reports about Mu'Min were not favorable, they did not

contain the same sort of damaging information [as those reflected in *Irvin*]." *Mu'Min v. Virginia*, 111 S.Ct. at 1907.

This Court has consistently held that, in evaluating the impartiality of the jurors who try a defendant and the venire from which they are chosen,

> we must distinguish between mere familiarity with the petitioner or his past and an actual disposition against him, just as we have in the past distinguished largely factual publicity from that which is invidious or inflammatory.

Murphy v. Florida, 421 U.S. 794, 800 n.4 (1975). Moreover, this Court found a marked contrast between the attitudes of members of the venire in this case and those in *Irvin*, where a change of venue was required:

> In the present case, eight of the twelve jurors who sat answered that they had read or heard something about the case, but none of those eight indicated that he had formed an opinion as to guilt, or that the information would affect his ability to judge petitioner solely on the basis of the evidence presented at trial.

Mu'Min v. Virginia, 111 S.Ct. at 1907.

For these reasons, an appeal based upon the trial court's denial of a change of venue would have been meritless, and counsel clearly exercised sound professional judgment in electing not to raise such a claim on direct appeal. *See Jones v. Barnes*, 463 U.S. at 751-52.

B. COUNSEL'S ELECTION NOT TO REQUEST AN ADDITIONAL LIMITING INSTRUCTION CONCERNING CONSIDERATION OF MU'MIN'S PREVIOUS MURDER CONVICTION

Evidence that Mu'Min was serving a 48-year sentence for first degree murder at the time he escaped and committed the instant crime was properly admitted, both to document his status as a correctional prisoner, and as an integral part of his conversation with police investigator Watson, voluntarily offered by Mu'Min to explain why he did not stay or call for assistance when, as he claimed in his initial statement to the police, he supposedly found the victim *in extremis* after having been stabbed by someone else. *See Mu'Min v. Commonwealth*, 239 Va. 443, 445-47, 389 S.E.2d 886, 894-95 (1990).

At the conclusion of the trial, the Court gave the following instruction to the jury:

> You may consider proof of the defendant's prior conviction of a felony as affecting his credibility, but it does not render him incompetent to testify, nor should you consider it as evidence of his guilt of the offense for which he is on trial.

The state courts properly held that Mu'Min failed to overcome the strong presumption that counsel exercised reasonable professional judgment in failing to request an additional jury instruction on this subject. *See Darden v. Wainwright*, 477 U.S. 168, 186 (1986); *Engle v. Isaac*, 456 U.S. at 134.

C. ABSENCE OF ADDITIONAL MITIGATION INSTRUCTIONS

The penalty phase instructions given at Mu'Min's trial are reprinted at pp. A-1 through A-3 of the appendix to this brief.

Counsel certainly was not required by reasonable professional standards to request an additional jury instruction concerning mitigating evidence. The Constitution does not require a state to adopt special standards in instructing the jury on mitigation, *Zant v. Stephens*, 462 U.S. 862, 890 (1983), and an explicit mitigation instruction is not required so long as the defendant's mitigating evidence was within the effective reach of the sentencer. *Johnson v. Texas*, 113 S.Ct. 2658, 2669 (1993). The standard penalty instructions used in this case have been repeatedly upheld as complying with constitutional requirements. *See, e.g., Pruett v. Thompson*, 996 F.2d 1560, 1577 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 487 (1993); *Jones v. Murray*, 947 F.2d 1106, 1119-20 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 1591 (1992); *Briley v. Bass*, 750 F.2d 1238 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985). This Court's prior denials of certiorari review of this issue are "ample evidence" that it is not worthy of such review. *Maggio v. Williams*, 464 U.S. 46, 51-52 (1983).

D. REASONABLE DOUBT INSTRUCTION

The "reasonable doubt" instruction which Mu'Min claims was defective is reprinted at p. A-4 of the appendix to this brief.

Counsel had no reason to object to the reasonable doubt instruction given. Mu'Min's reliance on *Cage v. Louisiana*, 111 S.Ct. 328 (1990), is misplaced. This Court's disapproval of the instruction given in *Cage* focused on the portions thereof which equated reasonable doubt with "grave uncertainty" and "actual substantial doubt," and equated proof beyond a reasonable doubt with proof to a moral certainty. 111 S.Ct. at 329-30. The instruction given in Mu'Min's trial suffered none of these infirmities. It used standard language which the Supreme Court of Virginia had described as "properly balanced . . . as to what constitutes proof beyond a reasonable doubt." *O'Dell v. Commonwealth*, 234 Va. 672, 699, 364 S.E.2d 491, 506 (1988), *cert. denied*, 488 U.S. 871 (1988).

È. "VILENESS" INSTRUCTION CONCERNING DEPRAVITY OF MIND

Neither was counsel ineffective for failing to maintain that the penalty instruction would unjustifiably permit the jury to base a sentence of death based on Virginia's "vileness" predicate upon a finding of "depravity of mind." "Depravity of mind" was defined for the jury as "a degree of moral turpitude or psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation."

The evidence showed that, after ripping his victim's clothes off, beating her face until it was unrecognizable, stabbing or slashing her 16 times, wiping his fingerprints from surfaces at the scene, and leaving her to die in a puddle of blood on the floor of her family-owned business, Mu'Min attempted to justify his actions with the

scurrilous claim that his victim, a middle-aged wife and mother, instigated the altercation which led to her death after Mu'Min rejected her sexual advances. On this record, Mu'Min submits to this Court that "there was no evidence that Mu'Min was depraved." (Pet. for cert., pp. 32-33).

Even if this proposition were not contrary to common sense, common decency, and Virginia law,[1] Mu'Min's claim would not establish ineffective assistance of counsel. Had counsel successfully objected to the inclusion of the "depravity of mind" alternative in the penalty instruction, there is nevertheless no reasonable likelihood that the jury would have failed to find "vileness" based solely on the aggravated battery which the evidence so clearly established, and Mu'Min has thus not been prejudiced by counsel's alleged failing in this regard. *See Strickland v. Washington*, 466 U.S. 668, 693-94 (1984).

F. JURY VERDICT FORM

Counsel had no grounds to object to the jury verdict forms. The Virginia jury verdict forms, which are reprinted at pp. A-3 and A-4 of the appendix to this brief, have repeatedly been held to give the jury ample opportunity to give effect to mitigating evidence by declining to impose the death penalty. *See, e.g., Clanton v. Muncy*, 845 F.2d 1238, 1242 (4th Cir. 1988), *cert. denied*, 485 U.S. 1000 (1988); *Mueller v. Commonwealth*, 244 Va. 409, 412-13,

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[1] Depravity of mind can be shown by lack of remorse. *See Thomas v. Commonwealth*, 244 Va. 1, 23-24, 419 S.E.2d 606 (1992), *cert. denied*, 113 S.Ct. 421 (1992).

422 S.E.2d 380, 394 (1992), *cert. denied*, 113 S.Ct. 1880 (1993); *Watkins v. Commonwealth*, 229 Va. 469, 490-91, 331 S.E.2d 422, 438 (1985), *cert. denied*, 475 U.S. 1111 (1985).

G. JURY QUESTION ABOUT THE MEANING OF A LIFE SENTENCE

During deliberations after the penalty trial, the jury submitted the following written question to the trial court: "We understand the death penalty. However, what exactly is life imprisonment?" The trial court answered in writing, "I am sorry; I cannot answer that question. Neither should you be concerned about it. [Judge's initials]."

Mu'Min's attempt to torture this response into a message that the jury's decision regarding the defendant's life was unimportant, or that life imprisonment was an improper penalty for him (Pet. for cert., p. 35, n.11) is absurd. The obvious import of the question was to ask the Court whether the legal effect of a "life sentence" was anything other than what the plain meaning of the words would convey, *i.e.*, that the defendant would be confined for the rest of his natural life.

Virginia law has long prohibited the trial court or counsel in a criminal case from presenting the jury who must sentence the defendant with any suggestion that the sentence which they deem appropriate may be reduced by the action of the executive branch of government through the Parole Board. *See generally Ramdass v. Commonwealth*, ___ Va. ___, ___, 437 S.E.2d 566, 573 (1993); *Mueller*, 244 Va. at 409, 422 S.E.2d at 394; *Stamper v. Commonwealth*, 220 Va. 260, 278, 257 S.E.2d 808, 821

(1979), *cert. denied*, 445 U.S. 972 (1980); *Hinton v. Commonwealth*, 219 Va. 492, 495-96, 247 S.E.2d 704, 706 (1978); *Peterson v. Murray*, 904 F.2d 882, 886 (4th Cir.), *cert. denied*, 111 S.Ct. 537 (1990); *Turner v. Williams*, 812 F.Supp. 1400, 1437 (E.D. Va. 1993). No existing precedent from this Court, or from the United States Court of Appeals for the Fourth Circuit, has ever required a contrary practice.

Regardless of this Court's pending decision in the case of *Simmons v. South Carolina*, No. 92-9059, then, it was well "within the range of competence demanded of attorneys in criminal cases," *Hill v. Lockhart*, 474 U.S. 52, 55 (1985), *quoting McMann v. Richardson*, 397 U.S. 759 at 771 (1970), for counsel to act in reliance on the state of the law at the time of Mu'Min's trial. He was not required to exercise clairvoyance by anticipating the possibility that a long-standing precedent might be overturned. *See Honeycutt v. Mahoney*, 698 F.2d 213 (4th Cir. 1983). Likewise, counsel was not required to recognize and raise every conceivable claim in Mu'Min's trial. *Engle v. Isaac*, 456 U.S. at 134.

Moreover, an explicit answer to the jury's question would have required disclosing that Mu'Min would not necessarily be confined for life, and might be paroled after 25 years. Va. Code § 53.1-151C (Cum. Supp. 1988). Counsel could reasonably have felt that such an answer would do more harm than good, and could have elected as a tactical matter not to object to the answer which the Court gave. Mu'Min's allegations have thus not overcome the strong presumption that counsel exercised reasonable professional judgment. *See Darden v. Wainwright*, 477 U.S. 168, 186 (1986).

H. "FUTURE DANGEROUSNESS" PREDICATE

Virginia's "future dangerousness" predicate has been consistently upheld against vagueness challenges such as Mu'Min contends counsel should have made. *See Spencer v. Murray*, 5 F.3d 758, 764-65 (4th Cir., Sept. 16, 1993); *Giarratano v. Procunier*, 891 F.2d 483, 489-90 (4th Cir. 1989), *cert. denied*, 498 U.S. 881 (1990); *Briley v. Bass*, 750 F.2d 1238, 1245 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985). There is nothing unconstitutional in calling upon a sentencing jury to predict the defendant's likely future dangerousness. *See Barefoot v. Estelle*, 463 U.S. 880 (1983); *Jurek v. Texas*, 428 U.S. 262, 274-76 (1976).

CONCLUSION

In the smorgasbord of claims which Mu'Min now urges that counsel should have made in his trial and direct appeal, there is not a single motion or objection which counsel had any reason at the time of Mu'Min's trial to believe would succeed or would benefit Mu'Min in any way. At best, these assertions would have been feckless distractions from those points which counsel reasonably felt could have benefitted Mu'Min, including the claim crafted and preserved by defense counsel which this Court deemed worthy of certiorari review; at worst, some of these claims could have detracted from counsel's trial strategy or emphasized unfavorable aspects of the case in the minds of the jurors. Counsel was not ineffective for failing to make any of these claims. For the foregoing reasons, Edward W. Murray respectfully

requests that this Court will deny the petition for writ of certiorari.

Respectfully submitted,

EDWARD W. MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF
CORRECTIONS

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Assistant Attorney General
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101 North Eighth Street
Richmond, Virginia 23219

INSTRUCTION NO. 1

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to life imprisonment. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at lest one of the following two alternatives:

1. That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or

2. That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment.

If the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the punishment of the defendant at life imprisonment.

INSTRUCTION NO. 2

Depravity of mind means a degree of moral turpitude and psychical debasement surpassing that inherent in the definition or [sic] ordinary legal malice and premeditation.

INSTRUCTION NO. 3

Aggravated battery means a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder.

INSTRUCTION NO. 6

The defendant is presumed to be innocent. You should not assume the defendant is guilty because he has been indicted and is on trial. This presumption of innocence remains with the defendant throughout the trial and is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the offense beyond a reasonable doubt. This does not require proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence. However, suspicion or probability of guilt is not enough for a conviction.

There is no burden on the defendant to produce any evidence.

A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the evidence in the case.

We, the jury, on the issue joined having found the defendant, DAWUD MAJID MU'MIN, a/k/a, DAVID MICHAEL ALLEN, GUILTY of Capital Murder of Gladys Keene Nopwasky,

in that;

1. the killing was committed while defendant was confined in a State Correctional Facility or while in the custody of an employee thereof;

and

2. that the killing occured during the commission of robbery while the defendant was armed with a deadly weapon,

and

A. having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society,

and/or

B. having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder

(Strike out A or B, of either you do not unanimously find.)

and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

/s/ Amos Stuart, Jr.
FOREPERSON

Commonwealth of Virginia
vs.
Dawud Majid Mu'Min
a/k/a David Michael Allen
Criminal Number 23103

April 24, 1989

WE, the jury, on the issue joined, having found the defendant, DAWUD MAJID MU'MIN, a/k/a, DAVID MICHAEL ALLEN, GUILTY of Capital Murder of Gladys Keene Nopwasky, in that; 1. the killing was committed while defendant was confined in a State Correctional Facility or while in the custody of an employee thereof; and 2. that the killing occurred during the commission of robbery while the defendant was armed with a deadly weapon, and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

_____
FOREPERSON

Commonwealth of Virginia

vs.

Dawud Majid Mu'Min
a/k/a David Michael Allen

Criminal Number 23103

April 24, 1989